Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

HOWARD RAY, CHARLES GALIPEAU
AND TROY ALEXANDER,

Petitioners,

v.

JUDY GAIL IWANSKI, PERSONAL
ADMINISTRATOR OF THE ESTATE OF
DON DOUGLAS IWANSKI, DECEASED,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the phrase "all prisoners in his situation" as used in *Farmer v. Brennan*, 511 U.S. 825 (1994) mean that all prisoners, based solely on the fact that they are in prison, are similarly situated or must other factors such as race or a particular crime committed exist to create similarly situated prisoners?

2. For the purposes of qualified immunity or summary judgment, is the sole fact that an inmate is assaulted by another inmate sufficient to establish a "risk to all persons similarly situated" as required by this Court in *Farmer v. Brennan*, 511 U.S. 835 (1994)?

3. Does the sole fact of the death of an inmate establish a culpable state of mind as required by *Wilson v. Seiter*, 501 U.S. 294 (1991) and *Farmer v. Brennan*, 511 U.S. 825 (1994), thereby preventing the granting of summary judgment based on qualified immunity?

4. Is it possible for a public official to be "immune from suit" when the Plaintiff alleges an Eighth Amendment violation of deliberate indifference to a substantial risk of safety to all similarly situated prisoners without specifically stating how this inmate is similarly situated to others allegedly at risk other than simply being incarcerated?

LIST OF PARTIES

The parties to this proceeding on Petition for Writ of Certiorari are:

Petitioners:

Howard Ray, Charles Galipeau and Troy Alexander

Defendants in the District Court and Appellees in the United States Court of Appeals for the Tenth Circuit

Respondent:

Judy Gail Iwanski, Personal Administrator of the Estate of Don Douglas Iwanski, deceased

Plaintiff in the District Court and Appellant in the United States Court of Appeals for the Tenth Circuit

TABLE OF CONTENTS

Page

Opinion Below 1

Statement of Jurisdiction 1

Statutory And Constitutional Provisions 2

Statement of the Case 2

Reasons For Granting The Petition 9

Conclusion 12

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Farmer v. Brennan, 511 U.S. 825 (1994) 9, 11

Wilson v. Seiter, 501 U.S. 294 (1991) i

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 2, 3

PETITION FOR WRIT OF CERTIORARI

Howard Ray, Charles Galipeau and Troy Alexander respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The Order of the United States Court of Appeals for the Tenth Circuit affirming in part and reversing in part the United States District Court for the Northern District of Oklahoma's granting of Petitioners' Motion for Summary Judgment. Order, Case No. 98-5135. The opinion of the Court of Appeals and the district court are unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit affirmed in part and reversed in part the appeal on December 14, 1999. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed within 90 days of December 14, 1999.

STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Code, Title 42:

§ 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

Amendment VIII Constitution of the United States:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

1. At the time this action arose, the decedent (Iwanski) was incarcerated with the Oklahoma Department of Corrections (DOC), housed at the Northeastern Oklahoma Correctional Center (NEOCC).

2. The personal representative of Iwanski brought this action seeking money damages pursuant to 42 U.S.C.

§ 1983 for alleged violations of Iwanski's rights pursuant to the Eighth Amendment to the United States Constitution.

3. The gravamen of the Complaint is that Defendants violated Iwanski's Eighth Amendment right to be free from cruel and unusual punishment by (1) failing to protect him from assault and (2) failing to provide proper medical care.

4. Defendants also asserted with respect to both the assault and the adequacy of medical care did not violate the Eighth Amendment to the United States Constitution.

5. After extensive discovery, the Defendants filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In the Motion, the Defendants asserted immunity from suit since, given the undisputed facts, their behavior was "objectively legally reasonable" and, therefore, they were entitled to dismissal on the basis of qualified immunity.

6. The district court granted the Defendants' Motion for Summary Judgment on the grounds that qualified immunity protected Defendants because their conduct was objectively reasonable and that Defendants' actions with respect to both the assault and medical care did not violate the Eighth Amendment. The district court also granted summary judgment as to supervisory liability and Eleventh Amendment immunity.

7. The Court of Appeals for the Tenth Circuit affirmed the granting of summary judgment on the supervisory liability claims, the Eleventh Amendment immunity defense, and the adequacy of medical care. The Court of

Appeals, however, reversed the district court's granting of summary judgment on the assault claim. The Court of Appeals found that taken as a whole, Plaintiff's evidence raised a genuine issue of material fact as to whether certain prison officials were deliberately indifferent to Iwanski's safety.

8. Iwanski and Kevin White were inmates confined at NEOCC. NEOCC is a minimum security facility operated by the DOC. Pursuant to unchallenged DOC policies and procedures, both inmates were classified as minimum security.

9. On or about February 4, 1995, Defendant Burke was assigned to drive the bus to transport the inmates from their housing unit – Building 14 – to the chow hall. White entered the bus and Defendant Burke questioned whether White was housed on Building 14. White replied by giving his name, DOC inmate number and answered "yes" he was housed in Building 14. Defendant Burke knew White and knew that he had previously been housed in Building 14. Defendant Burke asked White to remain on the bus when they arrived at Building 14 in order to confirm that White was housed there.

10. Defendant Burke did not notice anything strange or unusual about White's behavior nor did Defendant Burke detect the odor of alcohol.

11. At approximately 6:05 p.m., the bus full of inmates arrived at Building 14. All the inmates exited the bus. Against Burke's previous order, White exited the rear door, and Defendant Burke lost sight of him.

12. Defendant Burke exited the bus and entered the building. He immediately heard inmates yelling "man down" and Defendant Burke immediately went to the area and discovered Iwanski injured. One of the officers called for emergency help. Defendant Burke, with help from other correctional officers monitored the scene, checked on the other inmates, and prepared Iwanski for transport to the hospital.

13. DOC and NEOCC have procedures by which an inmate in fear of physical harm at the hands of other inmates may request protection. Those procedures include seeking separatees from one or more inmates and/or protective custody. Specifically, the policy provides that an inmate may request protective measures and a facility staff member may request protective measures for an inmate without the inmate's consent if there is documented cause.

14. Iwanski took no action with the Oklahoma Department of Corrections seeking protective custody or separatees from individual inmates.

15. Defendants were not aware of any dispute between Iwanski or other inmates at the time of the altercation. Defendants had no indication from Iwanski or any other source that Iwanski was in danger of any physical harm.

16. Iwanski's assigned case manager had no knowledge or indication that Iwanski was in danger. She was unaware of any dispute between Iwanski and other inmates.

17. Iwanski's mother did not notify nor did she ever attempt to notify any Department of Corrections'

employee that Iwanski was in fear for his life. She is not aware of anybody that talked to anybody at the Department of Corrections on behalf of her son.

18. The DOC has established operational policies and procedures for the agency as a whole and issues sets of manuals that contain those policies and procedures for the overall operations of a correctional facility. In 1995, the entire Oklahoma DOC was accredited by the American Correctional Association (ACA). The ACA is a professional organization which reviews states' correctional standards and compliance with standards which have been set by the ACA. Part of the accreditation process includes review of department operating policies and procedures.

19. DOC and NEOCC have rules and regulations concerning inmate behavior. Failure of an inmate to follow the rules and regulations could result in disciplinary charges being filed against the inmate. By DOC policy, gambling and possession and use of alcohol and drugs are prohibited.

20. In order to control contraband, it was the policy of NEOCC to conduct random shakedowns. Inmates were subject to searches at any time. They are also subject to random or suspect urinalysis testing, room inspections, and physical body searches. Searches are done on a routine basis at random times. Random searches and shakedowns of a unit, common area and bed searches are performed.

21. Correctional officers of NEOCC also performed "walk throughs" of the units to monitor inmate conduct and behavior. Walk throughs of the unit is a continuous

process to tour the unit and see what activity is going on and to monitor inmate behavior. During a normal shift, Defendant Burke would make several walks of the unit to check the building and make sure everything was okay.

22. Defendant Burke was not aware of any inmate alcohol use, illegal drugs, gambling or possession of weapons at the time of the assault. If such action became known to Burke, he would stop the activity and take disciplinary action against the inmates. Defendant Alexander and Defendant Galipeau were not aware of any inmate gambling and were not aware of any security problems at the facility. Defendant Middleton did not know of any inmate gambling.

23. In order to ensure that policies and procedures are followed at NEOCC, Defendant Warden Middleton, Defendant Deputy Warden Ray, Defendant Chief of Security Galipeau made period walk throughs of all areas of the facility to observe and interact in the form of asking questions of staff to determine how they handle certain matters and to kind of provide through checks and balances in terms of monitoring compliance with established procedures. They also had daily morning briefings and every incident report was reviewed and discussed. Whatever issue or problems came up would be discussed and they would outline if any mistakes had been made.

24. Defendant Ray would daily walk the units making sure people were actually doing their particular job. His policy was to go into the dormitories and watch the officers actually as they did counts and actually as they did shakedowns to ensure that the process was going on.

Defendant Ray's normal working hours at the facility were usually from 6:30, 7:00 a.m. and he sometimes wouldn't leave until 7:00, 8:00 o'clock at night, sometimes 10:00.

25. Defendant Galipeau's daily routine would be to spend four hours in and out of all the housing units, walking the grounds looking for security problems and generally touring the facility. Every time he would go into a unit he would tell the correctional officers to interact with the inmates.

26. In order to ensure officers were following procedures on his unit, Defendant Unit Manager Alexander during any given shift would walk the unit probably ten times.

27. Inmates also have the ability to utilize requests to staff that they can send to anybody in the facility to include the Warden where the inmate can identify areas that they believe policy and procedure is not being followed. In turn, the facility reviews the request, investigates and provides a written response.

28. Another way of ensuring that his staff was following procedures, from time to time either the deputy warden or warden might direct that there would be an inspection or an audit of a specific area or function of the facility in order to assess level of compliance of policies.

29. In February of 1995, NEOCC had been in operation for approximately two months. The fatal assault of Iwanski was the first and has been the only fatal assault of an inmate at NEOCC.

REASONS FOR GRANTING THE PETITION

This case presents this Court with the opportunity to further define "objective reasonableness" as used in *Farmer v. Brennan*, 511 U.S. 825 (1994) as opposed to a "subjective" standard which the Tenth Circuit Court has actually used in reaching its decision in this case. The Tenth Circuit Court of Appeals has subjectively determined that all inmates in a prison are faced with risk of physical harm and as such, prison officials should be held responsible for any attack, even if there is no indication to any official that there is any risk to any inmate.

The Tenth Circuit cites *Farmer v. Brennan*, 511 U.S. 825 (1994) and states that a plaintiff must show that prison officials "deliberately ignored a substantial risk to the safety of all inmates." Op. at 12. The Tenth Circuit goes on to assert a material question of fact exists solely because the decedent was an inmate who was injured at the hands of another inmate. The Court ignores the fact that there was no deliberate action by any of these Petitioners or that any of these Petitioners were aware that any of their actions constituted a substantial risk of safety to any inmate.

The Tenth Circuit while asserting an "objective review" of the Petitioners' actions actually applied a subjective standard against these Petitioners by finding that on its face, leaving metal pipe available to trustees at a minimum security prison is "objectively unreasonable," in spite of the availability of a multitude of other items which could have been used by an inmate to assault the decedent.

Implicit in the Tenth Circuit's Order reversing the granting of summary judgment is an application of a "subjective" standard of behavior by determining that officials at a prison where an inmate is harmed by another inmate are liable for a violation of an inmate's Eighth Amendment rights. The Tenth Circuit's Opinion indicates that all inmate assaults are a violation of the Eighth Amendment, or at the very least, raise a jury question as to liability. The Opinion further presumes that every inmate convicted of a violent crime is predisposed to commit a violent act while in prison. This opinion specifically ignores that prisons are full of convicted felons, most of whom do not commit violent acts while in prison. Such a stance by the Court would necessarily demand that prison officials use additional security controls for all prisoners, whether or not those inmates had ever acted violent in prison or whether officials had any knowledge that such inmate was about to act violently. This Order precludes any application of the defense of qualified immunity and will preclude a granting of summary judgment to any prison official in a similar suit.

More importantly, the Tenth Circuit relied on information discovered by the DOC internal affairs staff after the incident to determine the reasonableness of the officers' actions before the assault. There is no evidence in the record to show that any staff member knew of the problems or anticipated any violence prior to the assault in question. To allow the Court to use hindsight in determining reasonableness is not realistic. In fact, in the strictest sense, there will always be actions which could have been taken to prevent every assault. However, the reasonableness of the action at the time of the action is the

determining factor, not what is considered reasonable eight hours, a few months or five years later. Under the Tenth Circuit's application of reasonableness, the Court will always be able to find some action that could have been taken thereby assessing liability against a correctional officer regardless of what that officer knew or did at the time of or prior to the incident. The Tenth Circuit believes that what becomes known after such incident always could have or should have been discovered prior to any assault and is therefore the key to determining reasonableness. This expressly contradicts the holding in *Farmer*.

This case is important because the Tenth Circuit Opinion implies that an attack on a inmate constitutes an Eighth Amendment violation because one inmate is similarly situated to all other inmates solely by reason of their incarceration. The Tenth Circuit requires no other connection such as same race, sexual preference or similarity of crime committed which might place an inmate or group of inmates at more risk of harm. This decision, if not reversed and overturned by this Court, will establish a precedent in the Tenth Circuit that any attack on an inmate constitutes an excessive risk of harm solely because he is in prison. This subjective standard explicitly ignores the "objective reasonableness" requirement of *Farmer v. Brennan* and will prevent any granting of judgment prior to a trial in the matter causing unwarranted perpetuation of litigation. The Tenth Circuit's Opinion deprives a prison official of the protection needed to daily administer a prison and which have been provided by this Court.

CONCLUSION

This Court should grant certiorari to review the Tenth Circuit Court of Appeals' decision which concluded Plaintiff's evidence raised a genuine issue of material fact as to whether prison officials were deliberately indifferent to an inmate's safety.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUDY GAIL IWANSKI, Personal Administrator of the Estate of Don Douglas Iwanski, deceased, Plaintiff-Appellant, v. OKLAHOMA DEPARTMENT OF CORRECTIONS; LARRY FIELDS, Director of the Department of Corrections; JOHN MIDDLETON, Warden, Northeast Oklahoma Correctional Center; HOWARD RAY, Deputy Warden, Northeast Oklahoma Correctional Center; CHARLES GALIPEAU, Chief of Security, Northeast Oklahoma Correctional Center; TROY ALEXANDER, Unit Manager, Northeast Oklahoma Correctional Center; RANDALL BURKE, Corrections Officer, Northeast Oklahoma Correctional Center, all in their official and individual capacities, Defendants-Appellees.	)	No. 98-5135 (D.C. No. 97-CV-103-B) (N.D. Okla.) (Filed Dec. 14, 1999)

ORDER AND JUDGMENT*

Before **BALDOCK, REAVLEY,**** and **BRORBY,** Circuit Judges.

Plaintiff Judy Iwanski brought an action in the district court pursuant to 42 U.S.C. § 1983 on behalf of the estate of her son, Don Iwanski (Iwanski). Plaintiff sought damages resulting from Iwanski's death while he was incarcerated at Northeastern Oklahoma Correctional Center (NOCC). Plaintiff alleges Defendants violated Iwanski's Eighth Amendment right to be free from cruel and unusual punishment by (1) failing to protect him from a deadly assault and (2) failing to provide proper medical care following the assault. The district court concluded Defendants' alleged actions did not violate the Eighth Amendment. Accordingly, the district court granted Defendants' motion for summary judgment. Plaintiff appeals. We exercise jurisdiction under to 28 U.S.C. § 1291.

We review de novo the district court's grant of summary judgment, applying the same standard as the district court under Fed. R. Civ. P. 56(c). *See Simms v.*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** The Honorable Thomas M. Reavley, United States Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir.), *cert. denied*, 120 S. Ct. 53 (1999). Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When reviewing a grant of summary judgment, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *Simms*, 165 F.3d at 1326. Because Plaintiff has shown genuine issues of material fact as to some of her Eighth Amendment claims, we reverse in part, affirm in part, and remand for further proceedings.

I.

At the time of Iwanski's death, Iwanski and Kevin White were incarcerated at NOCC, a minimum security facility operated by the Oklahoma Department of Corrections (DOC). NOCC began operating in December, 1994, with many areas still under construction. As part of the construction and expansion, NOCC took over one floor of Adams Hall from Eastern State Hospital, which was adjacent to NOCC. Because the rooms at Adams Hall were larger than those previously used at NOCC, prison officials placed single beds into the rooms unstacked. The two-foot long metal pipes previously used to stack the beds were placed into the closet of each of the inmates' rooms.

On February 4, 1995, White took a steel bed leg from Adams Hall and boarded a bus to Building 14, the building in which Iwanski was housed. White had previously

been housed in Building 14, but had recently been transferred to Adams Hall. The driver, correctional officer Burke, questioned whether White was still housed in Building 14, and directed him to remain on the bus when they arrived at the building. Contrary to Burke's orders, White exited with the other inmates and Burke lost sight of him. Thereafter, White went to Iwanski's dorm, where Iwanski was sleeping, and struck him on the head several times with the steel bed leg. When the guards were notified that Iwanski was injured, they called an ambulance, which transported Iwanski to the hospital. Although Defendant Burke and inmate Ricky Price performed CPR on the way to the hospital, Iwanski died soon after his arrival.

In her complaint, Iwanski's mother, as administrator of his estate, alleged that numerous Defendants were deliberately indifferent to Iwanski's safety, and later, to his medical needs. Plaintiff brought claims against the director of the DOC, the warden, deputy warden, chief of security, and unit manager for NOCC, and correctional officer Burke, in their official and individual capacities. Plaintiff alleged that Defendants ignored a substantial risk of harm to Iwanski by allowing White access to the steel pipe, by not having appropriate procedures in place to protect Iwanski, and by improperly performing the procedures that were required. She alleged also that Defendants were deliberately indifferent to Iwanski's medical needs after the attack, resulting in his death. Finally, Plaintiff alleged that the DOC director and the NOCC warden were liable for their failure to enact appropriate policies and to supervise the other Defendants.

Defendants moved for summary judgment. Plaintiff's response to the summary judgment motion did not begin with a concise statement of disputed material facts, with each fact numbered and supported by a specific record cite, as required by the district court's local rules. *See* N.D. Okla. L.R. 56.1(B). Plaintiff did, however, refer to specific record evidence in the body of her argument. Although the district court noted Plaintiff's lack of compliance with the local rule, the court considered the evidence raised in Plaintiff's argument to determine Defendants' summary judgment motion on the merits. *See* Appellant's App. at 113-14.[1]

The court granted summary judgment in favor of Defendants on the following grounds: (1) the Eleventh Amendment barred Plaintiff's official capacity claims against Defendants; (2) Qualified immunity protected Defendants on the personal capacity claims because their conduct was objectively reasonable; (3) Defendants' alleged actions with respect to both the assault and the adequacy of medical care did not violate the Eighth Amendment; and (4) Defendants Fields and Middleton were not liable on the supervisory liability claims because the NOCC was operating under adequate DOC policies when it opened. On appeal, Plaintiff does not challenge the grant of summary judgment on her official capacity claims, but argues that the district court erred in granting summary in favor of Defendants on her individual capacity, claims.

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[1] Plaintiff's counsel is admonished to comply with *all* applicable court rules at *all* times, or proceed at her peril.

II.

The Eighth Amendment imposes a duty upon prison officials to protect prisoners in custody from violence at the hands of other prisoners. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994). To prevail on a claim of failure to protect under the Eighth Amendment, an inmate must show he was "incarcerated under conditions posing a substantial risk of serious harm," and that the prison officials subjectively knew of and disregarded that safety risk. *Id.* at 834, 837; *accord Grimsley v. MacKay*, 93 F.3d 676, 681 (10th Cir. 1996). "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842 (internal citation omitted).

Viewing the evidence in the light most favorable to Plaintiff, the evidence showed that inmate White was predisposed to violence. At the time he assaulted Iwanski, White was serving a sentence for several offenses, including assault and battery with a dangerous weapon after former conviction of a felony. Aplt. App. Add. at 86. He had already served a sentence for assault and battery upon a police officer. *Id.* While in prison, White had been assessed at least one misconduct point, which expired sixteen days before he assaulted Iwanski. *Id.* On the day of the assault, White had been involved in three separate fistfights with other inmates. *Id.* at 88-89. Nonetheless, several days before the assault, four steel pipes used for stacking bunk beds were stored in White's room. *Id.* at 87.

Plaintiff also presented evidence that prison officials recognized the danger of permitting inmates access to materials such as those found at a construction site, and that certain steps were taken to restrict such access. Aplt. App. at 83, 93; Aplt. App. Add. at 77. The policy prohibiting inmates from possessing weapons demonstrates that prison officials recognized the danger of allowing prisoners access to weapons, even those incarcerated at a minimum security facility.

The evidence also showed that supervision of inmates at NOCC was extremely lax. The Inspector General's report of the incident indicated that White ran weekly Friday night poker games while he was incarcerated in Building 14, and that Iwanski was known to participate in these games. Aplt. App. Add. at 91. Inmate Price's affidavit states that "open gambling games took place in the day room daily." *Id.* at 202.

According to witnesses, inmate White began drinking vodka on the day he moved into Adams Hall, January 30, 1995, and remained drunk for the entire week. Aplt. App. Add. at 87. On the day before the assault, he participated in a poker game in the unit day room, where he lost a significant amount of money because "he was too drunk to play." *Id.* at 88. White returned to his room at three in the morning and started a fight with one of his roommates. On the day of the assault, at approximately 1:00 p.m., White was involved in another fight with a different inmate. The fight left White bleeding from the mouth and nose, and with obvious bruises on his face. At approximately 2:00 p.m., White was so drunk that " 'you

could smell the alcohol on him 20' away.' " *Id.* At approximately 4:00 p.m., White started another fight with his roommate.

During the time that White was playing poker, was fighting with other inmates, and was visibly intoxicated, a NOCC policy required that inmates be counted on their bunks or at their assigned work area at 12:15 a.m., 1:00 a.m., 2:00 a.m., 3:00 a.m., 4:30 a.m., 7:30 a.m., 12:30 p.m., 4:30 p.m., 7:30 p.m., and 10:05 p.m. *Id.* at 93-94, 96-97. The fact that White engaged in such activities without detection supports the inference that prison staff did not follow the required inmate count procedures. These requirements took effect on December 13, 1994, more than six weeks before White assaulted Iwanski. The record also contains evidence that no requirements existed as to how many walk-throughs or random shakedowns should be performed per day or per shift. Aplt. App. at 51, 83, 88, 94.

Plaintiff presented additional evidence that supervision at NOCC was inadequate through the affidavit of inmate Price and deposition testimony of Defendant Galipeau. In his affidavit, Price stated that from NOCC's opening in December until the time of the assault, alcohol and drugs were readily available, there were too few NOCC staff to keep control of the inmates, and the guards rarely came out of their offices. *Id.* Galipeau confirmed this, by testifying that when he began working at NOCC, there was a problem with the correctional officers not leaving their offices. *Id.* at 98. The fact that the assault on Iwanski occurred twenty-three days after Galipeau began working at NOCC supports the inference that his testimony covered the time period in question. Finally,

Plaintiff presented evidence that although White had to have passed in front of the unit officers' office, the officers on duty never saw White enter or leave Iwanski's dormitory. Aplt. App. Add. at 90.

Several courts, including our own, have noted that the Eighth Amendment may be violated when prison officials permit inmate access to objects which could be used as weapons, especially when this conduct is accompanied by a lack of adequate supervision over the inmates. *See, e.g., Berry v. City of Muskogee*, 900 F.2d 1489, 1497-99 (10th Cir. 1990) (holding jury could find deliberate indifference to inmate safety based on evidence that (1) inmates, including crime partners, had 24-hour access to each other; (2) access to wire brooms was not controlled, thereby providing a readily accessible and dangerous weapon; (3) supervision was grossly inadequate; and (4) a jailer had been informed that the inmate feared for his life); *Goka v. Bobbitt*, 862 F.2d 646, 651-52 (7th Cir. 1988) (reversing summary judgment where inmate submitted evidence that prison officials knew of systematic lapse in enforcing tool control policy but failed to take action, thereby creating a climate where violence was likely); *Shrader v. White*, 761 F.2d 975, 982-83 (4th Cir. 1985) (noting possible Eighth Amendment violation based on allegations that scrap metal was not sufficiently safeguarded and methods employed to restrict manufacture of weapons were inadequate, if prison officials ignored problem after becoming aware of it); *Tillery v. Owens*, 719 F. Supp. 1256, 1276-77 (W.D. Penn. 1989) (holding failure to control access to dangerous weapons, which were pervasive throughout prison, combined with

lack of adequate staffing, demonstrated deliberate indifference to inmate safety), *aff'd*, 907 F.2d 418 (3d Cir. 1990); *see also Smith v. Arkansas Dep't of Correction*, 103 F.3d 637, 641, 648-50 (8th Cir. 1996) (affirming denial of summary judgment on qualified immunity grounds in case where allegations included inadequate supervision and failure to control access to hobby knives, the dangerousness of which officials were aware, but reversing summary judgment in favor of plaintiff); *Swofford v. Mandrell*, 969 F.2d 547, 549-50 (7th Cir. 1992) (holding allegations of placement of pretrial detainee charged with sexual assault in cell with ten others, failure to inspect cell for more than eight hours despite prisoner's screams, and availability of broom, all in violation of jail regulations, stated claim of deliberate indifference to prisoner's safety).

Although the issue is close, we conclude Plaintiff's evidence raises a genuine issue of material fact as to whether certain prison officials were deliberately indifferent to the risk created by providing White access to a steel bed leg which he used as a weapon. The fact that Iwanski did not ask for protection or that the officials were not aware of a specific risk to Iwanski is not dispositive. Plaintiff need not show that Iwanski was especially likely to be assaulted. *Farmer*, 511 U.S. at 843 ("[I]t does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."). Instead, Plaintiff needed to show only that the officials deliberately ignored a substantial risk to the safety of *all* inmates. *Id.* at 843-44.

Having concluded that Plaintiff raises genuine issues of material fact regarding the risk to which Iwanski was subjected, we must determine whether summary judgment was nonetheless appropriate for any Defendants. To be held liable for a § 1983 violation, a prison official must have been personally and directly responsible for the alleged Eighth Amendment violation. *See Grimsley*, 93 F.3d at 679. A supervisor may not be held liable unless an affirmative link exists between the constitutional violation and either the supervisor's personal participation or his failure to supervise. *See id.*

Applying this standard, DOC Director Fields is entitled to summary judgment. Defendant Fields did not directly participate in the alleged constitutional violation. The only indirect participation alleged is his failure to ensure that NOCC adopted its own operating manual before opening, and his failure to adopt DOC policies prohibiting possession of cash and defining a "weapon" to include a steel pipe. Given the undisputed evidence that NOCC was operating under the general DOC policies when it opened, Plaintiff has not shown that the facility was operating without rules or that these rules were constitutionally inadequate.

The evidence is also insufficient to link Warden Middleton to the alleged constitutional violation. Plaintiff has not shown that Middleton had any reason to know the steel pipes were stored in inmate White's room or that his duties included direct supervision of staff on a day-to-day basis. Plaintiff has alleged that Middleton failed to adopt an operating manual before NOCC opened; that the policies he did enact were deficient because they did not prohibit gambling, alcohol, drugs, or weapons; that

he did not ensure the correctional officers were trained by requiring testing; and that he did not provide restrictive housing for an endangered inmate or inform inmates what procedures to use if they felt threatened. These allegations do not demonstrate that Middleton was deliberately indifferent to Iwanski's safety, however, because NOCC was operating under the general DOC policies when it opened and such policies prohibit gambling, alcohol, drugs, and weapons; the record does not show that NOCC staff was unfamiliar with the required procedures; restricted housing was unnecessary because NOCC had a policy of transferring an inmate if informed of a threat; and even if one of the inmates was not informed of the procedure to be used if he felt threatened, Plaintiff has made no showing that Iwanski was not so informed. Even assuming Iwanski was not instructed on the procedure to be used, nothing indicates he would have acted differently had he been so instructed.

Finally, the evidence is insufficient to link correctional officer Burke to the alleged constitutional violation. Plaintiff has not shown that Burke played any role in storing the steel pipes in White's room or that he had any reason to suspect that White intended to harm Iwanski. Although Burke may have been careless in losing sight of White when he disembarked the bus, this does not rise to the level of deliberate indifference to Iwanski's safety. Thus, the district court properly granted summary judgment in Defendant Burke's favor.

Summary judgment should not have been granted, however, in favor of the remaining three defendants: Deputy Warden Ray, Chief of Security Galipeau, and Unit

Manager Alexander. Each of these defendants either participated in or acquiesced in placing the pipes in inmate White's room, and each was responsible for ensuring that the inmates were properly supervised.

Deputy Warden Ray was responsible for the day-to-day operation of the NOCC facility, including security. Aplt. App. Add. at 41, 54. His responsibilities included inspecting the new unit (Adams Hall) before inmates were moved in. *Id.* at 56. He indicated he was aware of the need to restrict inmate access to items such as construction materials. Aplt App. at 83. His management of the facility extended to walking through the dormitories, and to ensuring the inmate count and random shakedown policies were carried out on a daily basis. *Id.* at 83, 84.

Defendant Galipeau was responsible for the security of the facility, including supervising the correctional officers. Aplt. App. Add. at 41-42, 72-73. He inspected the NOCC facility, including the housing units, on a daily basis. Aplt. App. at 96. He was also aware of a problem with the correctional officers staying in their offices. *Id.* at 98.

Defendant Alexander was responsible for the overall operation of Building 14, where the assault occurred. Aplt. App. Add. at 42, 63. The record also contains evidence that he was the officer responsible for preparing Adams Hall for inmates, and that he took no steps to ensure that the steel pipes generated from unstacking the bunk beds were secured. *Id.* at 64-67.

A jury could infer from the evidence that these three Defendants were aware of the steel pipes stored in

inmates' rooms in Adams Hall but did not take steps to secure them, and that they were responsible for ensuring the inmates were adequately supervised. Thus, a factual dispute remains whether these Defendants were deliberately indifferent to the risk posed to the inmates.[2]

III.

Plaintiff also alleged that after the attack Defendants were deliberately indifferent to Iwanski's medical needs. In support of this claim, Plaintiff submitted an affidavit by inmate Price stating that after the attack on Iwanski, (1) the guards and/or other prison officials at the scene offered no assistance; (2) they did not transport him to the hospital for forty-five minutes; (3) prison officials on duty lacked sufficient emergency and medical training; (4) at the time of the attack no medical personnel were on duty at NOCC; and (5) had the prison staff provided timely and adequate medical attention, Iwanski's life would have been saved. Aplt. App. Add. at 202-03. We agree with the district court that this affidavit does not raise a genuine issue whether Defendants were deliberately indifferent to Iwanski's medical needs.

---

[2] Based on the record before us, we cannot say that storing steel pipes in an inmate's room and inadequately supervising the inmate is "objectively reasonable," qualified immunity should not have been granted to these three defendants. *See Hollingsworth v. Hill*, 110 F.3d 733, 740 (10th Cir. 1997) (holding once plaintiff shows that conduct, if proven, would violate clearly established right, defendant must show conduct was objectively reasonable).

Inmate Price's statements, regarding the lack of assistance offered by prison staff at the scene of Iwanski's attack and their delay in obtaining an ambulance, do not identify any of the named Defendants as being on the scene, and do not contradict the affidavit by Defendant Burke that he called for an ambulance as soon as he personally learned of the attack. Further, inmate Price lacks personal knowledge regarding the amount of training possessed by the prison officials on duty. Finally, even though inmate Price was previously a military medic, the record does not show that he had the medical expertise to opine whether Iwanski would have survived had different procedures been followed. The affidavit, therefore, does not raise a triable issue, and the district court properly granted summary judgment.

The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED in part and REVERSED in part, and the case is REMANDED for further proceedings.

Entered for the Court

Bobby R. Baldock
Circuit Judge

Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

HOWARD RAY, CHARLES GALIPEAU AND TROY ALEXANDER,

Petitioners,

v.

JUDY GAIL IWANSKI, PERSONAL ADMINISTRATOR OF THE ESTATE OF DON DOUGLAS IWANSKI, DECEASED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

SUPPLEMENTAL APPENDIX

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March 16, 2000

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28pp

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE ESTATE OF DON DOUGLAS IWANSKI, deceased,	)	
Plaintiff,	)	
vs.	)	Case No.
LARRY FIELDS, Director of the Department of Corrections, et al.,	)	97-CV-103-B
Defendants.	)	

JUDGMENT

(Filed Jun. 19, 1998)

This matter having come on for hearing on Defendants' Motion for Summary Judgment, the Honorable Thomas R. Brett presiding, and the issues having been duly decided by separate order entered herein,

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits, and that each party herein bear their own costs and attorney's fees.

DATED THIS 19th DAY OF JUNE, 1998.

/s/ Thomas R. Brett
THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE ESTATE OF DON DOUGLAS IWANSKI, deceased,	)	
Plaintiff,	)	Case No. 97-CV-103-B
vs.	)	ENTERED
LARRY FIELDS, Director of the Department of Corrections, et al.,	)	ON DOCKET DATE JUN 23 1998
Defendants.	)	

ORDER

Comes on for consideration Defendants' First and Second Motions for Summary Judgment filed November 7, 1997 and April 20, 1998 (Docket #'s 32 and 53) and the Court, being fully advised, finds as follows:

STATEMENT OF CASE

Judy Gail Poindexter Iwanski filed this action under 42 U.S.C. § 1983 on behalf of the estate of her son, Don Douglas Iwanski ("Iwanski"), who was incarcerated at the Northeast Oklahoma Correctional Center ("NEOCC") in Vinita from December 14, 1994 until his death on February 4, 1995. Kevin White ("White"), also an inmate at NEOCC, was convicted of murdering Iwanski by striking him in the head several times with a metal pipe which allegedly came from a bunk bed at NEOCC. Plaintiff names Larry Fields ("Fields"), former director of the Oklahoma Department of Corrections ("DOC"); John Middleton ("Middleton"), warden of NEOCC; Howard

Ray ("Ray"), deputy warden of NEOCC; Charles Gallipeau ("Gallipeau"), chief of security for NEOCC; Troy Alexander ("Alexander"), unit manager for NEOCC; and Randall Burke ("Burke"), a correctional officer at NEOCC, as defendants in their official and individual capacities.

Essentially, Plaintiff argues that Defendants violated Iwanski's Eighth Amendment right of freedom from cruel and unusual punishment and failed to provide appropriate medical care following the assault. Plaintiff further contends that Defendants failed to take reasonable actions to prevent Iwanski's murder at the hands of a fellow inmate. Plaintiff also brings a claim against the supervisory personnel alleging they failed to adequately supervise correctional personnel. Plaintiff seeks relief in the form of actual and punitive damages, as well as costs and attorney fees.

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT[1]

Pursuant to N.D. LR 56.1A., Defendants submitted a statement of undisputed material facts. This Court incorporates those undisputed material facts which the Court determined are supported by the record submitted in support thereof and lists additional undisputed facts

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[1] Undisputed facts have been modified where the Court determined the reference to the record does not fully support the fact asserted as stated. Plaintiff wholly failed to comply with the requirements of N.D. LR 56.1B., as more fully discussed at page 9 of this Order.

which aid in understanding the circumstances surrounding the incident which gave rise to this action as follows:

1. Iwanski and White were inmates confined at NEOCC, a minimum security facility operated by the DOC. Both inmates were classified minimum security.

2. Iwanski had previously been incarcerated with DOC for approximately two years. Both inmates were transferred into NEOCC from other facilities.

3. On or about February 4, 1995, Burke was assigned to drive the bus to transport inmates from Building 14, the housing unit in which Iwanski lived, to the dining hall and back. The dining hall was shared by inmates from Building 14 and Adams Hall, the housing unit in which White lived. Iwanski did not go to the dining hall that evening. At approximately 6:00 p.m., inmates boarded the bus to return to Building 14. White entered the bus and Burke questioned whether White was housed in Building 14. White replied by giving his name, DOC inmate number and answered "yes" he was housed in Building 14. In fact, he had been transferred to Building 10 and then to Adams Hall, the Eastern State Hospital Administration building, for reasons unrelated to Iwanski. Burke knew White and knew he had previously been housed in Building 14. Burke asked White to remain on the bus when they arrived at Building 14 in order to confirm that White was housed there.

4. Burke did not notice anything strange or unusual about White's behavior nor did Burke detect the odor of alcohol.

5. At approximately 6:05 p.m., the bus full of inmates arrived at Building 14. All the inmates exited the bus. Against Burke's previous order, White exited the bus, and Burke lost sight of him.

6. Burke exited the bus and entered the building. Shortly thereafter, Burke heard inmates yelling "man down" and immediately went to the area and discovered Iwanski injured, lying on his bunk. He was bleeding heavily about the head and making gurgling sounds. One of the officers called for emergency help. Burke, with help from other correctional officers, monitored the scene, checked on the other inmates, and prepared Iwanski for transport to the hospital.

7. The ambulance arrived at 1813 hours (6:13 p.m.). Burke assisted in getting Iwanski to the ambulance and performed CPR along with inmate Price while in route to the Craig County General Hospital. Iwanski was pronounced dead at 1840 hours (6:40 p.m.).

8. Numerous inmates apparently witnessed the assault and/or its immediate aftermath and also led prison officials to the weapon, a steel pipe approximately twenty-five (25) inches in length, one and one-half ($1^1/_2$) inches in width and weighing about four (4) pounds, which White had discarded in a new latrine at the front of the building following the attack.

9. White was found guilty of Iwanski's murder and sentenced to death. After the assault, it was determined that the attack was provoked by a dispute over gambling or drugs.

10. DOC and NEOCC have procedures by which an inmate in fear of physical harm at the hands of other inmates may request protection. Those procedures include seeking "separatees" from one or more inmates and/or protective custody.

11. Iwanski took no action with the DOC seeking protective custody or "separatees" from individual inmates.

12. Defendants were not aware of any dispute between Iwanski or other inmates at the time of the altercation. Defendants had no indication from Iwanski or any other source that Iwanski was in danger of any physical harm. There were no unusual circumstances or events that would have alerted Defendants or any prison official that Iwanski was in danger.

13. Iwanski's assigned case manager, Virginia Morris, had no knowledge or indication that Iwanski was in danger. She was unaware of any dispute between Iwanski and other inmates. She had used protective measures for inmates in the past when warranted.

14. Although Iwanski's mother has testified in her deposition that her son told her he was in danger, she did not notify nor did she ever attempt to notify any DOC employee to convey this information. No family member or friends of Iwanski notified any DOC employee that Iwanski was in fear for his life.

15. The DOC has established operational policies and procedures for the agency as a whole and issues sets of manuals that contain those policies and procedures for the overall operations of a correctional facility. In 1995,

the entire Oklahoma DOC was accredited by the American Correctional Association (ACA). The ACA is a professional organization which reviews states' correctional standards and compliance with standards which have been set by the ACA. Part of the accreditation process includes reviews of department operating policies and procedures.

16. Additionally, the DOC conducts a yearly review of all policies and procedures to review, update and revise the policies as necessary. The policies are reviewed and comments and suggestions are recommended. The executive staff of DOC then reviews the policies as well as the recommended changes. The policy then goes back to the responsible division for final review. It then comes back to executive staff and to the Director for final approval.

17. In addition to the DOC operations and procedures manual, the individual facilities implement a field manual for that particular facility based upon the requirements and guidelines of the DOC manual. For the field manual, each facility takes departmental policies and "operationalizes" them to fit the needs of that institution. For example, some facilities might have a farm unit while others do not. The field manual would reflect this individual facility distinction. The NEOCC manual is, in essence, a transparency of the DOC operations and procedure manual, with the exception of a few specific rules or regulations peculiar to NEOCC. In February 1995, NEOCC was in the process of compiling their field manual. When NEOCC was opened in December, 1994, the facility was operating under the DOC operations manual and field operations memorandum.

18. DOC requires its correctional officers to complete a six-week training program at the Center for Correctional Officer Studies which includes CPR training and emergency first aid training. There is also a yearly requirement of an additional 40 hours of training and part of the annual training includes training on various procedures of the facility and the agency. Managers of DOC must also attend yearly management training.

19. In order to ensure that employees receive their training, the DOC has a training department and each facility has a training officer who works jointly with the agency training department to ensure that training takes place.

20. DOC and NEOCC have rules and regulations concerning inmate behavior. Failure of an inmate to follow the rules and regulations could result in disciplinary charges being filed against the inmate. By DOC policy, gambling and possession and use of alcohol and drugs are prohibited. Inmates also remain subject to the laws of the state in which they are incarcerated.

21. In order to inform the inmates of policies and procedures of DOC and NEOCC, the inmates receive an orientation concerning the rules and regulations of the departments. The inmates are also informed of the disciplinary process.

22. In order to control contraband, it was the policy of NEOCC to conduct random shakedowns. Inmates were subject to searches at any time. They are also subject to random or suspect urinalysis testing, room inspections,

and physical body searches. Searches are done on a routine basis at random times. Random searches and shakedowns of a unit, common areas and bed searches are performed. Burke performed random shakedowns of inmates' living quarters, lockers and beds.

23. Correctional officers of NEOCC also performed "walk throughs" of the units to monitor inmate conduct and behavior. "Walk throughs" of the unit is a continuous process to tour the unit and see what activity is going on and to monitor inmate behavior. During a normal shift, Burke would make several walks of the unit to check the building and make sure everything was okay.

24. Burke was not aware of any inmate alcohol abuse, illegal drugs, gambling or possession of weapons at the time of the assault. If such action became known to Burke, he would stop the activity and take disciplinary action against the inmates. Defendants Alexander, Galipeau and Middleton were not aware of any inmate gambling and were not aware of any security problems at the facility.

25. In order to ensure that the DOC policies and procedures were being followed throughout the agency, Fields directed periodic audit teams to observe the running of an institution regarding policy compliance; the Department remained ACA accredited; there were investigations done from time to time; and, there were on-site personal visits by himself and his administrators. Fields states he personally conducted an on-site investigation and visit to NEOCC. Fields had a chain of command as to delegation of certain duties of overlooking specific facilities. Fields had several regional directors who were

assigned to specific facilities to advise Fields of the activities of a particular facility. The wardens of a particular institution reported to their assigned regional director.

26. In order to ensure that policies and procedures are followed by NEOCC, Middleton, Ray, and Galipeau made periodic walk throughs of all areas of the facility to observe and interact in the form of asking questions of staff, to determine how they handle certain matters and to provide monitoring compliance with established procedures. They also had daily morning briefings and every incident report was reviewed and discussed. Whatever issue or problems came up would be discussed and they would critique if any deficiencies were noted.

27. Ray would daily walk the units, making sure people were doing their particular job. His policy was to go into the dormitories and watch the officers as they conducted counts and/or shakedowns to ensure these were being done. Ray also would review incident reports to ensure that shakedowns were being done. Ray's normal working hours at the facility were usually from 6:30-7:00 a.m. and he sometimes wouldn't leave until 7:00-8:00 p.m. at night, sometimes 10:00.

28. Galipeau's daily routine would be to spend four hours in and out of all the housing units, walking the grounds looking for security problems and generally touring the facility. He would go into the units and tell the correctional officers to interact with the inmates.

29. In order to ensure officers were following procedures on his unit, Alexander during any given shift would walk the unit probably ten different times.

30. Inmates can also communicate requests to the staff, including the warden, when the inmate wants to report or complain that policy and procedure is not being followed. In turn, the facility reviews the request, investigates and provides a written response.

31. Another way of ensuring that staff was following procedures, from time to time, either the deputy warden or warden might direct that there would be an inspection or an audit of a specific area or function of the facility in order to assess level of compliance with policies.

32. In February, 1995, NEOCC had been in operation for approximately two months. The fatal assault on Iwanski was the first and the only fatal assault of an inmate at NEOCC.

33. No employee of NEOCC received any employment discipline as a result of the subject assault.

34. Both Iwanski and White were serving sentences, at least in part, for assault and battery and therefore had constructive and actual knowledge that this constituted prohibited behavior under the laws of the state of Oklahoma.

Defendants have supported their statement of undisputed facts with attached evidentiary material, referring "with particularity to those portions of the record before the court upon which movant relies," as required by N.D. LR 56.1A.

In response to Defendants' statement of uncontroverted facts, Plaintiff merely presents a list of facts claimed to be disputed, wholly failing to cite to evidence

in the record to sustain a material factual dispute. A mere recitation that a fact is controverted, without supporting authority, is not sufficient to create a controverted fact. N.D. LR 56.1B., provides in pertinent part:

> "The response brief to a motion for summary judgment . . . shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party."

Plaintiff has wholly failed to comply with N.D. LR 56.1B.

The local rule was promulgated to allow the Court and the parties to efficiently determine what material issues of fact remain to be determined by the trier of fact at the conclusion of discovery. If Plaintiff will not or cannot articulate and provide timely controverted evidentiary support for such issues of fact on the eve of trial, this Court has an obligation under Fed. R. Civ. P. 56 to summarily dispose of unwarranted claims.

Recognizing that this Court and the parties are best served when matters are decided on their merits, the Court has independently reviewed the statement of undisputed facts submitted by Defendants and finds them supported by the record. In reaching a decision on

the merits, the Court has also considered Plaintiff's evidentiary matter attached to the response brief, for the purpose of determining what, if any, material fact issues remain. The Court concludes that Defendants are entitled to entry of summary judgment under the uncontroverted facts presented by the record.

SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving part is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated: "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts . . . " Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

ARGUMENTS AND AUTHORITY

Defendants' submit the following propositions in their motions for summary judgment: (I) Plaintiff's civil rights claim against Defendants in their official capacity must be dismissed; (II) Defendants are protected by qualified immunity; (III) Plaintiff's Eighth Amendment rights were not violated; and, (IV) the undisputed facts fail to show supervisory liability.

Proposition I: Official Capacity

Defendants argue that Plaintiff's civil rights claim against them in their official capacity must be dismissed because the Eleventh Amendment provides the states with immunity from actions brought in federal courts unless the state has waived its immunity. Defendants correctly assert that suits filed against state officials in their official capacity are not considered suits against the individual officer but rather are suits against the office. *Will v. Michigan Dep't of State Police, et al.*, 491 U.S. 58, 71 (1989); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Defendants further assert that the state of Oklahoma has not waived its Eleventh Amendment immunity. The State of Oklahoma has waived its sovereign immunity from liability of the torts of its employees only as set forth in The Governmental Tort Claims Act. *Okl. Stat.* tit. 51 §§ 151, et seq. (1992 & Supp. 1994). However, the act clearly states that the state reserves its Eleventh Amendment immunity. *Okl. Stat.* tit. 51, § 152.1 B. (1992).

Plaintiff, who brings this action under U.S.C. 42 § 1983, argues that suits against government officials in their official capacities are appropriate if the custom or policy of the agency in question played a role in violating a federal law. Plaintiff relies on *Hafer v. Melo*, 502 U.S. 21 (1991), to support this proposition. *Hafer*, which involved a suit against a state official in her personal, not official, capacity, is not dispositive here because its reference to the "custom or policy" of the agency derives from *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978). The defendant in *Monell*, however, was an agency of a municipality, and the court concluded that

municipal corporations were "persons" subject to suit under § 1983. *Id.* at 2034.

Plaintiff has offered no legal authority for the proposition that the states are also "persons" who can be sued for nonprospective relief under § 1983. "Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant." *Papasan v. Allain,* 478 U.S. 265, 278 (1986). Nor has Plaintiff advanced any argument that Congress intended to abrogate the states' Eleventh Amendment immunity when it passed § 1983 "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Dellmuth v. Muth,* 491 U.S. 223, 227 (1989) (quoting *Atascadero State Hospital v. Scanlon* 473 U.S. 234, 242 (1982)). No such language is apparent in § 1983.

Plaintiff argues that certain DOC and NEOCC policies or customs, or the lack thereof, are sufficient to establish a genuine issue of material fact as to Defendants' official capacity liability. This argument is not persuasive, given the existing state of the law with respect to the states' sovereign immunity. Based on the foregoing, Defendants' motions for summary judgment with respect to Defendants' official-capacity liability should be GRANTED.

Proposition II: Qualified Immunity

Defendants also move for summary judgment on the theory that they are protected by qualified immunity.

Government officials performing discretionary functions are protected by qualified immunity unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988). Motions for summary judgment founded upon qualified immunity must be analyzed under a two-part framework. The court must determine "whether the plaintiff has asserted a violation of a constitutional or statutory right," and then must decide whether that right was clearly established such that a reasonable person in the defendant's position would have known the conduct violated the right. *Davis v. Gracey*, 111 F.3d 1472, 1477 (10th Cir. 1997) (citing *Garramone v. Romo*, 94 F.3 1446, 1449 (10th Cir. 1996)).

Plaintiff cites *Farmer v. Brennan*, 511 U.S. 825, 933 (1994) to the effect that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners," as proof that Iwanski had a clearly established right under the Eighth Amendment to be protected from White when the attack occurred in February, 1995. Defendants' positions is that the "contours" of this right were not sufficiently clear that a reasonable person in a Defendant's position would have realized he was violating the right.

This court concludes that Iwanski had a right to protection, but that Defendants acted reasonably in view of all the circumstances to provide that protection. "If the law was clearly established, the immunity defense should ordinarily fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982).

Defendants state that "[e]ven defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." Quoting *Davis v. Scherer*, 468 U.S. 183, 190 (1984). "Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' *Id.* at 191. Defendants essentially contend that their conduct meets the "objectively reasonable" test. Among the undisputed facts Defendants provide to support this argument are depositions indicating: (1) neither they nor any other officials with the DOC or NEOCC were aware that Iwanski was in any danger of being attacked, (2) Iwanski took no action with the DOC seeking protective custody, (3) White's attack on Iwanski was sudden and unannounced, (4) the NEOCC is a minimum security facility and both Iwanski and White were classified as minimum security inmates, (5) DOC has established policies and procedures for the agency's operation and issues manuals containing those policies and procedures for the operation of a correctional facility and, (6) when NEOCC opened, it was operating under the DOC operations manual and field memorandum.

Plaintiff disputes these facts with statements made during depositions indicating: (1) NEOCC had no field operations manual in place when Iwanski was transferred there, (2) neither the DOC nor the NEOCC had any regulations expressly prohibiting the use of metal pipes as weapons, (3) neither the staff nor the prisoners at NEOCC were familiar with the DOC regulations

allegedly in force at the facility when IWANSKI was killed and, (4) NEOCC had no facilities in February, 1995 to house prisoners who believed they were in danger. Plaintiff contends that these and other statements provided in the record indicates that Defendants' conduct was not "objectively reasonable" and that summary judgment therefore should be denied.

The Court finds Defendants are entitled to summary judgment on the issue of qualified immunity for the reason that their conduct under the circumstances was "objectively reasonable" Plaintiff has wholly failed to establish that any prison official was ever advised by Iwanski or anyone else that he feared for his safety. The only testimony from anyone regarding this is from Iwanski's mother, who claims to have been told by her son he feared for his safety during a visitation on the day of his death. Although present at the prison at the time this information was given to her, the mother did not advise or make inquiry of prison officials nor did she attempt to contact anyone outside the prison to determine whether anything could be done for her son. At some earlier date in January, 1995, Iwanski's mother had supplied a money order to another inmate on her son's behalf for what she believed to be a gambling debt yet there is no evidence that she advised or conferred with anyone at the prison regarding what policies were in place to prevent the illegal activity which she alleges led to her son's death. There is no evidence that the named Defendants herein knew of this activity. Further, there is no indication that correction officer Burke should have been alerted by his observation of White, in what he suspected to be the wrong area, to the fact that White

intended to commit an act of violence toward another inmate. White was dressed in the color required to be worn by the inmates of that unit and inmate unit transfers were not unusual events. Nor would it arouse suspicion for an inmate to be wearing a coat in early February in Northeastern Oklahoma under which he may have something concealed. Additionally, while a metal pipe can be a dangerous weapon capable of killing, so can many other articles present at a construction site housing minimum security prisoners.

Viewing all the evidence and inferences in a light most favorable to Plaintiff, summary judgment is appropriate as to this claim and Defendants' motions should be GRANTED.

Proposition III: Eighth Amendment

Plaintiff alleges Defendants violated Iwanski's Eighth Amendment rights by failing to adequately protect him from White's assault and by failing to provide appropriate medical care following the assault. Defendants assert that the undisputed facts fail to establish that Iwanski's Eighth Amendment rights were violated. Defendants' statement of undisputed facts includes references to the record indicating that Defendants were unaware of any threat to Iwanski, that NEOCC was operating under the DOC operations manual when it opened in December, 1994, that correctional officers must complete six weeks of training before they are assigned to a facility and must also undergo additional training on a yearly basis. Defendants also provide references to the record indicating that officials at NEOCC conducted random shakedowns and

searches of inmates, that NEOCC administrators walked through the facility regularly to ensure that certain policies and procedures were followed, and the NEOCC inmates are informed of the DOC's and the facility's rules and regulations.

The statement of disputed facts contained in Plaintiff's response, again, contains no references to the record disputing Defendants' claims. Plaintiff's brief, however, does contain references to the record which attempt to raise genuine disputes with respect to both the assault and medical care allegations. For example, Plaintiff's affiant Ricky Price (Price), who was also incarcerated at NEOCC at the time, states that he received no orientation regarding NEOCC policies when he was transferred to the facility in December 1994. This contradicts a statement provided by Middleton in his deposition indicating that inmates receive an orientation regarding the rules and procedures of the DOC and of the individual facility. It does not however establish whether Iwanski had received this orientation at this or any other facility. There is no evidence that Iwanski was unaware of rules and regulations which would have allowed him to seek protection.

Price also states that inmates at NEOCC had "free access to pipes, bricks, nails and other construction material . . . "when he was incarcerated at the facility. Price states that NEOCC had no established policies and procedures between December, 1994, and February, 1995, that correctional officers and officials at the facility had insufficient medical training, and that there were no medical personnel on duty at NEOCC when White attacked Iwanski. Burke testified that he had training in CPR and

first aid at the academy. It was Burke who worked along with Price to administer CPR and emergency care on the way to the hospital and Price does not question the care provided by Burke in that situation.

Price also states that correctional officers and officials at the facility offered no immediate medical assistance to Iwanski after the attack and that approximately 45 minutes expired between the time of the attack and the arrival of an ambulance. Plaintiff has not established Price as an expert in the medical field in which he attempts to provide testimony. The court has nothing before it to show to what extent Price was trained by the military as a medic and if that training went beyond the CPR which he helped administer to Iwanski. Further, even if this court accepts Price's statement that 45 minutes expired before professional medical aid was provided to Iwanski, which contradicts all other documentary evidence and oral testimony in the case, 45 minutes does not in itself support a claim of deliberate indifference in furnishing medical treatment under the Eighth Amendment. *Wilson v. Seiter,* 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); and *Caldwell v. District of Columbia,* 901 F.Supp. 7 (D.D.C. 1995). Nor has Plaintiff established that Price is competent to offer expert testimony about whether Iwanski would have survived, had medical assistance been different following the attack. Fed.R.Civ.P. 702. The attack on Iwanski, which consisted of at least six blows directly to the head, apparently came when he was sleeping or at least unsuspecting of what was about to transpire. When found, Iwanski was lying with considerable blood on his face, making only

gurgling sounds. There is no competent evidence in the record that any particular timely medical care would have saved Iwanski's life.

Plaintiff's response also refers to statements made by DOC and NEOCC officials indicating that NEOCC did not have a local policy manual in place in February, 1995, that officials at NEOCC received no training regarding any local rules governing the facility's operation, and that officials did not secure the steel pipes that were removed from the bunk beds, one of which White allegedly used in the assault on Iwanski.

Plaintiff fails to recognize that the technical incompleteness of the NEOCC field manual at the time this facility was opened did not leave the facility without appropriate policies and procedures. Plaintiff overstates the importance of the field manual and understates the importance of the DOC operations and field manuals under which the facility was operating. The staff had been trained under DOC policies and procedures. The NEOCC field manual, when completed, was a virtual transparency of the DOC manual which appropriately dealt with the issues and conduct involved.

"[A] prison official may be liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer,* 511 U.S. at 847. A prison official's knowledge of a substantial risk may be inferred from circumstantial evidence. *Id.* at 842. "[A] fact finder may conclude that a prison official knew of a

substantial risk from the very fact that the risk was obvious." *Id.*

The Court concludes there were no conditions or circumstances at NEOCC, known to prison officials, or of which they should have been aware, that Iwanski's personal safety or life was in danger. Therefore, Defendants' motions for summary judgment with regard to both the assault and medical care issues regarding the Eighth Amendment claim, should be GRANTED.

Proposition IV: Supervisory Liability

The supervisory Defendants contend that they are entitled to summary judgment because the undisputed facts show no supervisory liability. Again, Defendants rely on those undisputed facts indicating DOC policies governed the operations of NEOCC when Iwanski was killed. Defendants' statement of undisputed facts also indicates that the DOC received an accreditation from the American Correctional Association in 1995 and that DOC conducts a yearly review of its policies and procedures, updating and revising them as necessary. None of these facts are disputed by Plaintiff.

Plaintiff asserts Defendant Fields failed to ensure that a local field operations manual was enacted for NEOCC when Iwanski and White were transferred there, and that the DOC policy governing the facility was inadequate because it failed to restrict an inmate's possession of a steel pipe. Plaintiff asserts Defendant Middleton is liable because he failed to establish operation procedures at NEOCC. Specifically, Plaintiff asserts that NEOCC had no regulations prohibiting inmates' possession of "green

money," drugs or alcohol, nor regulations prohibiting gambling, activities which Plaintiff contends played a role in Iwanski's murder. In sum, Plaintiff asserts that the policies implemented by Fields and Middleton were so inadequate that they amounted to a deprivation of Iwanski's Eighth Amendment rights. The evidence in the record does not support this assertion.

"[A] supervisor may be held liable if there exits either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Thompkins v. Belt,* 828 F.2d 298, 304 (5th Cir. 1987). "Supervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Id.*

Defendants argue that Plaintiff has failed to show that any DOC policy amounts to a repudiation of a constitutional right. Defendants characterize Plaintiff's argument as an allegation that Defendants deviated from the DOC policy, resulting in a constitutional violation. Plaintiff, however, appears to argue that the policies implemented by Fields and Middleton were sufficiently deficient to find Fields and Middleton liable.

Plaintiff further asserts that Defendants Ray, Alexander, and Gallipeau were personally involved in violating Iwanski's Eighth Amendment rights. Plaintiff contends Ray failed to ensure that correctional officers

were knowledgeable about NEOCC's policies and procedures, failed to ensure the staff received adequate medical training and failed to ensure the staff was sufficiently trained to cope with emergencies. The evidence does not support these assertions. There is no specific policy to which Plaintiff refers which directly caused or encouraged the apparent sudden unprovoked attack. Further, there is no competent medical evidence in the record to establish that the emergency care provided to Iwanski was improper or that other appropriate care would have saved or prolonged his life. Burke and other staff were trained in CPR and first aid at the academy. Both inmates were well aware that Oklahoma law prohibits assault and battery because both inmates were serving time for that offense.

Plaintiff asserts that Alexander and Gallipeau took no action to secure the pipes that had been removed from the bunk beds and failed to ensure that correctional officers properly supervised the inmates at NEOCC. These bald assertions, when viewed in light of the uncontroverted facts herein, do not provide a legally sufficient link to create an inference of proximate cause for Iwanski's death.

In conclusion, viewing all the evidence and inferences in a light most favorable to the nonmovant, and for reasons previously stated herein, Defendants are granted summary judgment.

IT IS THEREFORE ORDERED that Defendants' Motions for Summary Judgment are hereby GRANTED.

DONE THIS 19th DAY OF JUNE, 1998.

/s/ Thomas R. Brett
THE HONORABLE
THOMAS R. BRETT
UNITED STATES
DISTRICT JUDGE

ORIGINAL

FILED
APR 17 2000
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

HOWARD RAY, CHARLES GALIPEAU and TROY ALEXANDER,

Petitioners,

vs.

JUDY GAIL IWANSKI, Personal Administrator of the Estate of DON DOUGLAS IWANSKI, deceased,

Respondent.

Case No. 99-1534

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

COMES NOW, the Respondent, by and through its attorney of record, Shannon Davis, and moves this Honorable Court for leave to proceed *In Forma Pauperis*. In support thereof, the Respondent alleges and states as follows:

1. This action was brought pursuant to 42 U.S.C. §§ 1983, 1988, seeking monetary damages for injuries suffered by Don Douglas Iwanski while a prisoner at Northeast Oklahoma Correctional Center, which ultimately resulted in his death.

2. Northeast Oklahoma Correctional Center is a minimum security prison operated under the direction and control of an agency of the State of Oklahoma, more particularly, the Department of Corrections.

3. The Estate of Don Douglas Iwanski, Deceased, is without any assets, and is therefore unable to pay the costs necessary to respond to the Petition herein.

4. The Estate of Don Douglas Iwanski, Deceased, has received no funds or income within the last twelve months.

5. The Estate of Don Douglas Iwanski, Deceased, has no cash or money in a checking or savings account.

6. The Estate of Don Douglas Iwanski, Deceased, owns no real estate, stocks, bonds, notes, automobiles or other valuable property.

7. The Estate of Don Douglas Iwanski, Deceased, has already incurred significant expenses related to this action.

8. The Estate of Don Douglas Iwanski, Deceased, is unable to pay the $600 - $800 cost of preparing a brief as required by Supreme Court Rule 33.

9. On June 9, 1998, the United States District Court for the Northern District of Oklahoma granted the Respondent leave to proceed *in forma pauperis* at the trial court level.

10. On July 15, 1998, the United States District Court for the Northern District of Oklahoma granted the Respondent leave to proceed *in forma pauperis* on appeal.

11. Respondent would further direct this Court's attention to the Affidavit of Shannon Davis, which is attached hereto and marked as Exhibit "A".

WHEREFORE, premises considered, Respondent respectfully prays this Honorable Court grant it leave to proceed *in forma pauperis*.

Respectfully Submitted,

Shannon Davis, OBA# 15752
406 S. Boulder, Suite 400
Tulsa, OK 74103
(918) 582-1124

STATE OF OKLAHOMA)
) **SS.**
COUNTY OF TULSA)

AFFIDAVIT

Your Affiant, Shannon Davis, being first duly sworn, on oath, states:

1. Your Affiant is the attorney representing the Estate of Don Douglas Iwanski, Deceased, in the District Court of Sequoyah County, State of Oklahoma, Case No. P-97-16. This Affidavit is made on your Affiant's personal knowledge.

2. As attorney for the Estate of Don Douglas Iwanski, Deceased, your Affiant has reviewed the financial accounts and assets of said Estate.

3. Don Douglas Iwanski died intestate on February 4, 1995. At the time of his death, he owned no property and had no financial accounts which could be used to pay the costs incurred in responding to the Petition filed in this action.

4. Your affiant has read the above Motion for Leave to Proceed *In Forma Pauperis*, and would state that all statements therein are true and correct to the best of your Affiant's knowledge and belief.

Further your affiant sayeth not.

Shannon Davis

Subscribed and sworn before me this 14th day of April, 2000.

Notary Public

My Commission Expires:

Exhibit "A"

99-1534

IN THE SUPREME COURT OF THE UNITED STATES

HOWARD RAY, CHARLES GALIPEAU
AND TROY ALEXANDER,
Petitioners,

vs.

JUDY GAIL IWANSKI, PERSONAL
ADMINISTRATOR OF THE ESTATE OF
DON DOUGLAS IWANSKI, DECEASED
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Shannon Davis, OBA #15752
406 S. Boulder, Suite 400
Tulsa, OK 74103
(918) 528-1124
Attorney for Respondent

List of Parties

In addition to the parties listed by Petitioners, three additional parties warrant mention. Larry Fields, John Middleton and Randall Burke were defendants/appellees in the proceedings below. The claims against Fields, Middleton and Burke were dismissed by the District Court. The Tenth Circuit sustained the dismissal as to these parties.

Table of Contents

List of Parties i

Table of Contents ii

Table of Authorities iii

Statement of Jurisdiction 1

Statement of the Case 1

I. Procedural History 1

II. Statement of Facts 2

Summary of Argument 5

Argument 6

I. Neither the Record nor the Decision Below Raise the Questions Presented by the Petition 6

II. The Tenth Circuit's Ruling Does Not Conflict With *Farmer v. Brennan* 6

Conclusion 9

TABLE OF AUTHORITIES

Cases

Farmer v. Brennan, 511 U.S. 825 (1994) 1, 5, 6, 7, 9

Elder v. Holloway, 510 U.S. 510 (1994) 7

Rules

Sup. Ct. R. 10 ..... 1, 10

Other

U.S. Const. Amend. VIII 2

STATEMENT OF JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for certiorari only for compelling reasons. According to Rule 10, compelling reasons can be found, among other things, if the decision leading to the petition: is in conflict with a decision of another United States court of appeal on some important matter and/or state court of last resort; reflects a departure from the usual course of judicial proceedings; or, presents an important question of federal law that has not been but should be settled by this Court.

Petitioner have not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. Petitioners have not and cannot present any question which would show that the Tenth Circuit's decision is in conflict with the decision entered by another United States Court of Appeal, a decision by a State Court of last resort, or that the decision rendered departs from the accepted and usual course of judicial proceedings. Instead, Petitioners attempt to invoke this Court's authority by asking it to correct errors supposedly committed by the Tenth Circuit, and to overturn this Court's decision in *Farmer v. Brennan*, 511 U.S. 835 (1994). For the reasons explained below, the Tenth circuit did not commit any error when it held that there was sufficient evidence to warrant reversal of the district court's granting of the Petitioner's Motion for Summary Judgment.

STATEMENT OF THE CASE

I. Procedural History

1. This action was originally brought against six (6) Defendants. All Defendants below, including the three (3) Petitioners herein, filed a Motion for Summary Judgment in the District Court, contending that they did not violate Iwanski's Constitutional Rights and further

asserted that they were entitled to qualified immunity, claiming that there actions were "objectively reasonable".

2. The District Court granted the Motion for Summary Judgment, as to all Defendants, holding that their actions/inactions did not violate the Eighth Amendment and that the Defendants were further entitled to qualified immunity.

3. Respondent timely appealed the District Court's decision to the Tenth Circuit. After both parties fully briefed the matter, and after entertaining oral argument, the Tenth Circuit entered its unanimous opinion, affirming the dismissal of the claims against Larry Fields, John Middleton and Randall Burke, and further affirming the dismissal of Petitioner's claims which were based upon the inadequacy of medical care. However, the Tenth Circuit reversed the District Court's granting of summary judgment against the Petitioners herein, Howard Ray, Charles Galipeau and Troy Alexander on Respondent's claims of failing to protect. In so deciding, the Tenth Circuit held that Respondent's evidence raised a genuine issue of material fact as to whether certain prison officials were deliberately indifferent to the risk created by providing White access to a steel bed leg which he used as a weapon, and that a factual dispute remains whether these Defendants were deliberately indifferent to the risk posed to the inmates. Pet. App. at 10.

II. Statement of Facts

Petitioner's State of the Case includes numerous misstatement of fact. Respondent offers the following as a correct account of the facts in this case.

1. Judy Gail Iwanski was the mother Don Douglas Iwanski (hereinafter Iwanski), and was appointed as the personal representative of the Estate of Don Douglas Iwanski, deceased.

2. At the time this action arose, Iwanski and Kevin White were incarcerated with the Oklahoma Department of Corrections (DOC), housed at the Northeastern Oklahoma Correctional Center (NOCC).

3. On or about February 4, 1995, Kevin White assaulted Iwanski with a two foot long, four to five pound metal pipe while Iwanski's was asleep in his bunk at NOCC.

4. NOCC began operating in December, 1994. At the time of the assault, many areas of the facility were still under construction. As part of the construction and expansion, NOCC took over one floor of Adams Hall from Eastern State Hospital, which was adjacent to NOCC. Because the rooms at Adams Hall were larger than those previously used at NOCC, prison officials placed single beds into the rooms, unstacked. The two-foot long metal pipes previously used to stack the beds were placed into the closet of each of the inmates rooms, either by the Petitioners or at their direction. Kevin White used one of these pipes to kill Iwanski.

5. Judy Iwanski, as personal representative of the Estate of Don Douglas Iwanski, brought this action seeking monetary damages pursuant to 42 U.S.C. § for alleged violations of Iwanski's rights, pursuant to the Fourth, Eighth and Fourteenth Amendments to the United States Constitution.

6. On or about February 4, 1995, Howard Ray was Deputy Warden of NOCC and was responsible for the day-to-day operations of the facility, including security. His responsibilities included inspecting Adams Hall before inmates were moved in. He was aware of the need to restrict inmate's access to items such as construction materials.

7. On or about February 4, 1995, Troy Alexander was Unit Manager at NOCC, and was responsible for the overall operations of the Units in which both Kevin White and Don Iwanski

were housed. He was the officer responsible for preparing Adams Hall for inmates and he took no steps to ensure that the steel pipes generated from unstacking the beds were secured.

8. On or about February 4, 1995, Charles Galipeau was Chief of Security at NOCC. and responsible for the security of the facility and supervision of the security staff. He inspected the facility on a regular basis. He was aware of a problem with the correctional officers staying in their offices, and the fact that the inmates had access to weapons such as the one used to kill Iwanski.

9. At the time of the assault, DOC and NOCC had a policy prohibiting inmates from possessing weapons, consuming alcohol and gambling.

10. Supervision of the inmates at NOCC was extremely lax.

11. White ran weekly Friday night poker games while he was incarcerated at NOCC. The day before the assault White participated in a poker game in the unit day room and lost a significant amount of money because he was too drunk to play.

12. White began drinking vodka on January 30, 1995, the day he moved into Adams Hall, and remained drunk the entire week. At 2:00 p.m. the day of the assault, White was so drunk that you could smell the alcohol on him from 20 feet away.

13. During the time that White was playing poker, was fighting with other inmates and was visibly intoxicated, an NOCC policy required that inmates be counted on their bunks or at their assigned work area at 12:15 a.m., 1:00 a.m., 2:00 a.m., 3:00 a.m., 4:30 a.m., 7:30 a.m., 12:30 p.m., 4:30 p.m., 7:30 p.m. and 10:05 p.m.

14. On February 4, 1995, White took a steel bed leg from Adams Hall and boarded a bus to Building 14, the building in which Iwanski was housed. When he arrived at Building 14,

White walked past the officers on duty, beat Iwanski to death, and then walked past the officers off duty to exit the building.

15. Galipeau was aware that the correctional officers were not leaving their posts to watch the inmates.

16. The Petitioners recognized the danger of permitting inmates access to weapons and other materials such as steel pipes, and they were aware that White had access to steel pipes.

17. At the time of the assault, White was serving a sentence for assault and battery with a dangerous weapon after former conviction of a felony. He had already served a sentence for assault and battery upon a police officer. While in prison White had been assessed at least one misconduct point, which expired sixteen days before the assault on Iwanski.

18. NOCC'S "shakedown" policy does not state how many random shakedowns should be performed per day or per shift.

19. There were no requirements at NOCC as to how many walk-throughs should be performed per day or per shift.

20. On the day of the assault White had been involved in three separate fist fights with other inmates. At 3:00 a.m. he started a fight with one of his roommates. At 1:00 p.m. he was involved in another fight with a different inmate, which left him bleeding from the mouth and nose, and with obvious bruises on his face. At 4:00 p.m. White started another fight with his roommate.

SUMMARY OF ARGUMENT

Petitioners have failed to assert any proper reason for this Court to grant certiorari. The record below does not support the issues they have presented in their petition. At best, the petition asserts only that the Tenth Circuit misapplied the law as enunciated by this Court in *Farmer v.*

Brennan, 511 U.S. 825 (1994). This is simply not true. The Tenth Circuit's decision is well within the boundaries of *Farmer*. However, even if the Tenth Circuit did misapply *Farmer*, it properly stated the rule of law, and therefore, certiorari should not be granted. Sup. Ct. R. 10.

ARGUMENT

I. Neither The Record Nor The Decision Below Raise The Questions Presented By The Petition.

The case below, as it related to the Petitioners, involved two basic questions: (1) Whether there was a genuine issue of material fact regarding the Plaintiff's Eighth Amendment claims; and (2) Whether storing steel pipes in an inmate's room and inadequately supervising the inmates is, *per-se*, "objectively reasonable", thereby entitling the Petitioners to qualified immunity as a matter of law. The Tenth Circuit determined that there was a genuine issue of material fact regarding the Plaintiff's Eighth Amendment claims and that the Petitioners failed to prove that the storing of steel pipes in an inmate's room and inadequately supervising the inmate was "objectively reasonable". Pet. App. at 14, n. 2. None of the issues presented by Petitioner were raised, addressed or decided on at either the District Court or the Tenth Circuit, and therefore are not supported by the record, or the previous decisions.

II. The Tenth Circuit's Ruling Does Not Conflict With *Farmer v. Brennan*.

Petitioner represents that the Tenth Circuit misapplied this Court's decision in *Farmer v. Brennan*, 511 U.S. 825 (1994). Contrary to Petitioner's assertion that the "Tenth Circuit Court of Appeals has subjectively determined that all inmates in a prison are faced with risk of physical harm and as such, prison officials should be held responsible for any attack, even if there is no indication to any official that there is any risk to any inmate", the Tenth Circuit Court used the

appropriate standard in concluding that Respondent's evidence "raises a genuine issue of material fact as to whether certain prison officials were deliberately indifferent to the risk created by providing White access to a steel bed leg which he used as a weapon". Pet. App. at 10.

Farmer held that in order to find a prison official liable under the Eighth Amendment, it must be shown that the official acted with deliberate indifference. *Id.* at 834. The person must "consciously disregard" a substantial risk of serious harm. *Id.* at 837. Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. *Id.* at 842.

Relying on *Farmer* the Tenth Circuit posed the question as whether Iwanski was incarcerated under conditions posing a substantial risk of serious harm and whether the prison officials subjectively knew of and disregarded that safety risk. Pet. App. at 6. It held that a jury could infer from the evidence that Ray, Galipeau and Alexander were aware of the steel pipes stored in the inmates rooms in Adams Hall (and the risk they caused), but did not take steps to secure them, and that these Defendants were responsible for ensuring the inmates were adequately supervised. Pet. App. at 13-14. This created a factual dispute as to whether the Defendants were deliberately indifferent to the risk posed to the inmates. Pet. App. at 14.

The Tenth Circuit then addressed the Petitioners' claims of qualified immunity. In order to utilize this defense, a defendant must show that their conduct was "objectively reasonable" in light of clearly established law. *Elder v. Holloway*, 510 U.S. 510, 512 (1994). The Tenth Circuit found that Ray, Galipeau and Alexander each either participated in, or acquiesced in, placing the pipes in inmate White's room, and that each was responsible for ensuring that the inmates were properly supervised. Pet. App. at 13. Based upon these facts, the Tenth Circuit could not find that the

Defendant's actions in storing steel pipes in an inmate's room and inadequately supervising the inmates was "objectively reasonable", and determined that Ray, Galipeau and Alexander should not have been granted qualified immunity. Pet. App. at 14.

The Tenth Circuit's decision was not nearly as broad as Petitioners would have this Court believe. Petitioners would have this Court believe that the Tenth Circuit held that prison officials are responsible under the Eighth Amendment for **all** inmate assaults. This is not how the Tenth Circuit ruled. The Circuit Court simply reviewed the evidence and drew reasonable inferences therefrom in the light most favorable to the Respondent, as required when ruling on a motion for summary judgment. Pet. App. at 3. Based upon that standard of review, the Tenth Circuit Court reviewed the entirety of the evidence presented to it, and based its decision on many facts in making its determination that a genuine issue of material fact exists, including but not limited to: (1) that White was predisposed to violence, Pet. App. at 6; (2) that Ray, Galipeau and Alexander each either participated in, or acquiesced in, placing the pipes in inmate White's room, and that each was responsible for ensuring that the inmates were properly supervised, Pet. App. at 13; (3) that prison officials recognized the danger of permitting inmates access to materials such as the pipe used to kill Iwanski, Pet. App. at 7; (4) that the policy of prohibiting inmates from possessing weapons demonstrated that the Petitioners recognized the danger of allowing prisoners access to weapons, even those incarcerated at minimum security facilities, Pet. App. at 7; (5) that supervision at NOCC was lax, Pet. App. at 7; (6) that supervision at NOCC was inadequate, Pet. App. at 8; and, (7) that White had been drinking vodka from January 30, 1995 until the day of the assault, Pet. App. at 7.[1]

---

[1] Petitioners assert that the Tenth Circuit relied on information discovered by the DOC internal affairs staff after the incident to determine the reasonableness of the officers' actions before the assault. Pet. Br. at 10. However, Petitioners fail to state what this supposed evidence is.

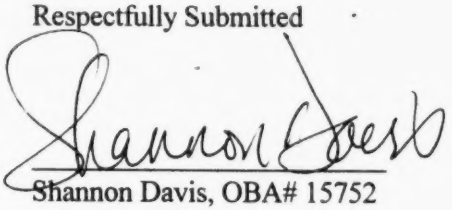
Based upon these facts, and others not cited herein, the Tenth Circuit determined that there was sufficient evidence for a jury to conclude that the Defendant's conduct was deliberately indifferent to the risk created by providing White access to a weapon, and that the Defendants' actions were not objectively reasonable. Pet. App. at 14.

There is simply no reason to grant certiorari in this case. Petitioners have failed to present anything which would show that the Tenth Circuit's decision is in conflict with any decision entered by another United States Court of Appeal or a decision by a State Court of last resort, or that the decision rendered departs from the accepted and usual course of judicial proceedings. Furthermore, the question of federal law herein has been previously settled by this Court's decision in *Farmer v. Brennan*. The Tenth Circuit's decision is in conformity with that decision .

CONCLUSION

This Court should deny certiorari to review the Tenth Circuit Court of Appeals' decision which concluded that Plaintiff's evidence raised a genuine issue of material fact as to whether prison official were deliberately indifferent to the risk posed to the inmates.

Respectfully Submitted



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